Supreme Court, U. S.
FILED
JUL 15 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1548

ANTHONY G. ALATERAS

Petitioner

versus

FLOYD J. HEPTING AND AMERICAN RADIO ASSOCIATION AFL-CIO

Respondent

BRIEF IN OPPOSITION OF RESPONDENT

C. PAUL BARKER
DODD, BARKER, BOUDREAUX
LAMY & GARDNER
1400 Richards Building
837 Gravier Street
New Orleans, Louisiana 70112
Counsel for Respondent

OF COUNSEL:
Edwin A. Steinberg
99 Park Avenue
New York, New York 10016

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

INDEX

	PAGE NO.
Question Presented	1
Counter Statement of the Case	1
Additional Statutory Provisions Involved	2
Argument	3
Conclusion	11
Certificate of Service	12
Appendix A	A-1
Appendix B	A-5
Appendix C	A-8

TABLE OF AUTHORITIES

	PAGE NO.
Association of Machinists v. Gonzales, 356 U.S. 617 (1958)	3,5
Farmer v. Carpenters Local 25, 45 USLW 4263, U.S. March 7, 1977	7,8
Local 100, Plumbers v. Borden, 373 U.S. 690 (1963)	5,6
Local 207, Bridge Workers v. Perko, 373 U.S. 701 (1973)	5
Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission 132 (1976)	4
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971)	4,5
San Diego Building Trades v. Garmon, 359 U.S. 236 (1959)	3,5
Vaca v. Sipes, 385 U.S. 925 (1967)	9
OTHER:	
Labor Management Relations Act, (29USC 151)	2
United States Code, Title 29, Sec. 157	2
United States Code, Sec. 158(a)(3)	3
United States Code, Sec. 158(b)(1)(A)	3
NLRA(29 USC 151)	3
Article 2315	8

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

NO. 76 - 1548

ANTHONY G. ALATERAS

Petitioner

versus

FLOYD J. HEPTING AND AMERICAN RADIO ASSOCIATION AFL-CIO

Respondent

BRIEF IN OPPOSITION OF RESPONDENT

QUESTION PRESENTED

Whether Plaintiff's claim that Defendants caused him to be refused employment is sufficiently interwoven with the administration of federal labor policy to allow the State Court's determination that the claim was subject to the exclusive jurisdiction of the National Labor Relations Board over alleged unfair labor practices.

COUNTER STATEMENT OF THE CASE

Plaintiff's original petition, (Appendix A) sought damages on the grounds that Defendants had caused Pacific Far East Lines to refuse to employ Plaintiff by placing him on an improper hiring list. The crux of the claim was that because of an alleged improper application of union rules governing the relative status of union members waiting for employment, Plaintiff lost certain wages that were said to amount to $700,000.00.

At roughly the same time that suit was initiated, charges were filed with the National Labor Relations Board claiming that Defendants' action constituted an unfair labor practice. The Regional Director for the Fifteenth Region refused to issue a complaint since his investigation did not disclose evidence that the Labor Management Relations Act, (29 USC 151), has been violated. Upon appeal, the General Counsel for the NLRB affirmed that decision on the basis that the action taken with regard to Plaintiff resulted from a belief that he was attempting to circumvent hiring hall procedures and thus did not result from any unlawful intent. (Appendix B and C)

As set forth in the opinions reproduced in the Petition for a Writ of Certiorari, the State Courts first concluded that there was no merit to Plaintiff's claim at State law and that judgment should be rendered in favor of Defendants and then on an appeal that there was no jurisdiction to entertain this suit.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 157. Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right

may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

§ 158(b) (1) (A)

"It shall be an unfair labor practice for a labor organization or its agents -

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;"

ARGUMENT

Rule 19 of the Rules of the Supreme Court indicates that a writ of certiorari will issue where a state court has decided a substantial federal question in a way probably not in accord with decision of this Court. Here that would appear to mean that a writ should issue if the Louisiana Court of Appeals improperly applied the test based in *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959) that activity arguably subject to § 7 or § 8 of the National Labor Relations Act (NLRA), 29 USC 151 et seq. should be exclusively handled by the NLRB. To grant writs it would be necessary to find that the theory rooted in *Association of Machinists v. Gonzales*, 356 U.S. 617 (1958) should apply and that there should be no preemption since the activity in this case does not fall within the scope of regulation of labor affairs undertaken by federal law.

At the outset the instant case can be distinguished from holdings like *Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) and its antecedents that deal with preemption in areas where Congress meant an activity to be unregulated. The claim of Mr. Alateras does not relate to the area of economic weapons that are available in the labor context and are neither protected nor prohibited by the law. Rather, his claim falls within the area where the National Labor Relations Board (NLRB) has exclusive jurisdiction and is not of the type of activity where no court or agency could take jurisdiction.

The *Garmon* rule as restated in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971) is based upon the rationale that when Congress acted in the labor relations area, it intended to fundamentally restructure the processes through which the federal labor policy is to be effectuated. Administration of the new system was entrusted to the NLRB to assure uniformity in the rules of law, the remedies and the administration of the federal labor policy. The common law courts were seen by Congress as incapable of providing "an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good." (*Lockridge*, supra, 286)

To avoid potential conflict in the administration of labor policy this Court has evolved the doctrine that the jurisdiction of state and federal courts is preempted by the NLRB when activity arguably falls within § 7 or § 8 of the National Labor Relations Act (NLRA), the substantive areas of NLRB administration.

Lockridge held that this preemption precluded state litiga-

tion whether the state was attempting to act through a law specifically directed at the labor context or through a law of general application such as Article 2315, the general tort article in the Louisiana Civil Code. State action was permitted in the labor area only when such action was peripheral to the concerns of the NLRA and *Garmon* was read in the *Lockridge* decision as limiting *Gonzales* to permit state action only in this peripheral area.

Three cases give guidance as to what sort of activity lies in this peripheral area, the first to be dealt with being *Local 100, Plumbers v. Borden*, 373 U.S. 690 (1963). In that case the peripheral area delineated in *Gonzales* was held to be purely internal union concerns not having to do with matters of employment. The NLRB was recognized as being without power to restore a man to union membership when it was due to internal actions of the union that were unrelated to employment. Mr. Borden's claim dealt with alleged improper administration of a hiring hall. The refusal of the union to refer him along with the resulting inability to obtain employment were found to be arguable violations of § 8(b) (1) (A) and § 8(b) (2) of the NLRA. The crux of his claim involved the union causing an employer to discriminate against Borden and coercing him in the exercise of his protected right to refrain from observing internal rules. Because of the complexities in the administration of hiring halls and the fact that the conduct complained of was arguably within the mainstream of the LMRA this court held jurisdiction over this conduct was vested exclusively within the NLRB.

Local 207, Bridge Workers v. Perko, 373 U.S. 701 (1963) involved a similar situation where the crux of the claim involved alleged interference with the plaintiff's existing and future employment relationships by the union. Plaintiff had

sought to sue the union on a tort theory because the union had supposedly caused his discharge. Here again the conduct of the union, if proven, would arguably constitute an unfair labor practice and proven, would arguably constitute an unfair labor practice and therefore the state court was required to yield to the jurisdiction of the NLRB.

Factually, the *Borden* case is quite similar to the instant litigation since Plaintiff's claim is based upon his assertion that the union improperly applied the hiring hall rules by placing his name on the Active Beach List rather than the Standby List. His claim is not a purely internal matter since the action of the union affected Plaintiff's employment by Pacific Far East Line. If the union's action was improper it would be a violation of Section 8(b)(2) of the NLRA which prohibits a union from causing an employer to discriminate against an employee in violation of Section 8(a)(3). The action could also be found to be a violation of Section 8(b)(1)(A) which indirectly protects an employee's right to refrain from concerted activity. Thus the conduct complained of, i.e. improperly causing Plaintiff to be denied employment by an alleged improper application of the union rules with respect to hiring lists, is arguably within the ambit of Section 8 of the NLRA and thus subject to the exclusive jurisdiction of the NLRB.

Under these facts, the point that the union's conduct, if true, would arguably fall within § 8 results in more than just a mechanical application of the preemption rule. The administration of a hiring hall as an integral part of the employment process under negotiated collective bargaining agreements is an activity that transcends state borders when dealing with seamen as in this case. It is a process that is particularly suited to regulation under the special expertise acquired by the NLRB and one that could be seriously disrupted by the application of different rules of law in the many jurisdictions in which the American Radio Association has offices. The possibility of conflict between state and federal policy is especially evident here where Plaintiff is attempting to effect the labor policy of the American Radio Association and indirectly the employers who are signatory to collective bargaining agreements with them, after having had his claims rejected as without merit by the NLRB. Assumption of jurisdiction in this case by a Louisiana court leads to the possibility that a change in the manner in which men are placed upon the various hiring lists would be required either by court order or by feat of future damage actions in a situation where the NLRB found no such change to be necessary under the policies set forth by Congress in the LMRA.

In this connection, the case of *Farmer v. Carpenters Local 25*, 45 USLW 4263, __ U.S. __ , March 7, 1977, is pertinent. In that case, the plaintiff alleged the tort of intentional infliction of emotional distress as the result of an alleged harrassment campaign by the local union. This campaign allegedly resulted in discrimination against the Plaintiff in referrals from the union hiring hall as well as personal abuse that caused him emotional damages. Here it was found that the state cause of action was designed to protect against the "outrageous conduct" by the union. As such,it was unrelated to the claim of employment discrimination in the sense that the abusive conduct complained of was not a result of the discrimination in employment opportunities. Any relationship between the tort and the discrimination here would be that the outrageous conduct forming an element of the claim would be a result of the abusive nature in which the

employment discrimination was accomplished rather than a function of the discrimination itself.

Because the tort inquiry in *Farmer* would not deal with the manner in which employment discrimination was accomplished but rather with abusive conduct on the part of union agents, the inquiry was deemed sufficiently separate from the area of NLRB jurisdiction so as to allow state proceedings without fear of the conflicts that might develop. The state action would not provide redress against employment procedures as administered by the union but rather would provide damages for the allegedly outrageous actions of union agents. Similarly the NLRB inquiry would not address itself to the issue of this conduct nor would it award damages. Rather it would concern itself with finding whether employment discrimination was practiced and ordering corrective measures if such discrimination were found.

•

The Louisiana tort claim alleged by Plaintiff Alateras is not as limited in scope as that in the *Farmer* case. Article 2315 provides that "Every act whatever of man that causes damage to another obligates him by whose fault it happened to repair it." An inquiry under the broad language of 2315 is not limited to a search for abusive or outrageous conduct on the part of the defendants, but rather would be an inquiry into the very nature and operation of the hiring system involved here. The State Court would be reviewing the action taken with respect to Alateras to see if it was a proper application of union rules as they relate to employment referrals. It would be investigating the exact same area as that covered by the NLRB with the possibility that a different result would be arrived at or a different remedy ordered. The State Court would be regulating the administration of the hiring

system without the benefit of the accumulated expertise in the labor field possessed by the NLRB. Thus the possibility for conflict between state law and the national labor policy is great and under the decisions of this court the Louisiana Court of Appeals was correct in finding that jurisdiction over Plaintiff's claim was preempted by the NLRB.

One further possibility that could grant Plaintiff a state court action, but in fact does not on the present facts, is if he had alleged the breach of the union's duty of fair representation. Under *Vaca v. Sipes*, 385 U.S. 925 (1967) there is no justification for preemption in this area since the NLRB had adopted the doctrine from the federal courts and does not possess any particular expertise to review positions taken by a union in contract negotiations or in processing grievances.

The original petition did not allege, nor did the trial court find that there was any breach of contract by an employer that should have been pursued by the defendants here and thus the present case does not involve a breach of any duty to handle grievances. Nor do the facts indicate that the defendants did not act in good faith or in an arbitrary manner since both the opinion of the trial court, which dealt with the merits, and the determination by the NLRB General Counsel found that the Union believed Alateras to have attempted to subvert the Union constitution thus justifying the placing of his name on the Active Beach List instead of the Standby List as he had requested. And finally there is no allegation that the Union failed to properly represent Alateras when it negotiated the hiring system now in effect. Therefore the exception to the preemption doctrine represented by fair representation suits is inapplicable to save

Plaintiff's litigation since the facts as found and as alleged do not indicate any breach of the duty of fair representation.

One final point that was addressed in the Petition for Certiorari is the issue of equity in the present system of the NLRB in cases where it exercises exclusive jurisdiction such as this one. If a Regional Director finds as a result of his office's thorough investigation that there is insufficient evidence to substantiate a charge he may refuse to issue a complaint. In his investigation the charging party has an opportunity to present his evidence, though admittedly not in the formal setting of a courtroom. Here Alateras had that opportunity in the New Orleans office of the NLRB, the same city he chose as a home town tribunal for the tort claim he asserted in State Court. His appeal to the General Counsel in Washington from an adverse decision by the Regional Director is not as expensive and exhaustive as asserted in the Petition for Certiorari since the main additional expense involved in an appeal to Washington, as opposed to an appeal in a local forum, is postage.

Additionally, Alateras is not without remedy if the NLRB determines not to issue a complaint based upon his charge. There are internal union appeal procedures that can afford the desired relief if they are timely initiated. Thus there are two available appeals procedures that would mitigate against altering the policy behind the preemption doctrine on any equity grounds. The danger of conflict with federal labor policy would seem to outweigh any inequity caused by denial of a state court forum to an individual in Alateras' position.

CONCLUSION

Because the decision of the Louisiana Court of Appeals for the Fourth Circuit is in accordance with the decisions of the Supreme Court, no Writ of Certiorari should issue in this case.

Respectfully submitted,

C. PAUL BARKER
DODD, BARKER, BOUDREAUX,
LAMY & GARDNER
1400 Richards Building
837 Gravier Street
New Orleans, Louisiana 70112
Counsel for Respondent

OF COUNSEL:

Edwin A. Steinberg
99 Park Avenue
New York, New York 10016

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1977, three copies of the Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to E. Howard McCaleb,III, Esq., 536 First N.B.C. Building, New Orleans, Louisiana, Counsel for the Petitioner. I further certify that all parties required to be served have been served.

C. Paul Barker

APPENDIX A
PETITION FOR INTERFERENCE WITH EMPLOYMENT

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. DIVISION: DOCKET:

ANTHONY G. ALATERAS

VS.

FLOYD J. K. HEPTING and
AMERICAN RADIO ASSOCIATION AFL-CIO

FILED: March 28, 1972 DY. CLK:

PETITION FOR INTERFERENCE WITH EMPLOYMENT
($750,000.00)

Petition of Anthony G. Alateras, domiciled in this Parish, with respect shows:

I

The defendant, Floyd J. K. Hepting, is domiciled in the Parish of Jefferson, while the defendant, American Radio Association AFL-CIO (hereinafter called the Union) is a Union affiliated with the American Federation of Labor and Congress of Industrial Organizations, with its national office located in New York, New York, with a branch office located in this Parish; has been and is doing business within the State. Both defendants are justly indebted to your petitioner

in solido in the sum of $750,000.00 with interest thereon from date of judicial demand and the cost of these proceedings, the following, to-wit:

II

Petitioner was employed by Pacific Far East Line Steamship Company on February 12, 1972, and assigned to the S/S JAPAN BEAR. Petitioner was temporarily layed off from his employment, and defendant Hepting refused to place plaintiff upon the Stand By List, as it was his duty to do under the union rules; for defendant Hepting stated that petitioner was in collusion with the employer, and maliciously caused the National Council of the Union to relinquish petitioner's assignment and place him at the bottom of the Active Beach List.

III

On March 3, 1972, Mr. Leonard Johnson was assigned to petitioner's employment with the Pacific Far East Steamship Company, even though the defendant Union, by its officers, agents, and representatives, knew that it had caused Pacific Far East Lines to refuse to employ plaintiff by preventing him from being placed upon the Standby List, removing him from his official work assignment, and placing him at the bottom of the assignment list, for arbitrary, irrelevant, invidious, and discriminatory reasons.

IV

Plaintiff itemizes his damages which he sustained as the result of the defendants' malicious interference with his employment, as follows:

Loss of Wages	$700,000.00
Mental anguish and distress	50,000.00
Total	$ 750,000.00

WHEREFORE, plaintiff prays for judgment against Floyd J. K. Hepting and American Radio Association AFL-CIO, in solido, for $750,000.00, with legal interest thereon from date of judicial demand until paid and the cost of these proceedings.

s/ E. Howard McCaleb,III
E. HOWARD MCCALEB,III
Attorney for Plaintiff
627 NBC Bldg. 523-1953
New Orleans 70112

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, personally appeared Anthony G. Alateras, who deposed that he is the plaintiff in the above entitled cause, that he has read the petition; and that all of the facts alleged therein are true and correct.

s/ Anthony G. Alateras
ANTHONY G. ALATERAS

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 27th DAY OF MARCH, 1972

s/ E. Howard McCaleb, III
NOTARY PUBLIC

A TRUE COPY
S/ M. O. Kuelec
Deputy Clerk, Civil District Court
Parish of Orleans
State of Louisiana

Please serve:
(1) American Radio Association AFL-CIO
room 207 - 270 Madison Avenue
New York, New York
Through Secretary of State

(2) Floyd J. K. Hepting
Room 413 - Perdido Building
822 Perdido Street
New Orleans, La.

APPENDIX B
LETTER DATED APRIL 28, 1972 FROM NLRB to
ANTHONY G. ALATERAS

NATIONAL LABOR RELATIONS BOARD
REGION 15
T6024 Federal Building (Loyola)
701 Loyola Avenue, New Orleans, Louisiana 70113
Telephone 527 - 6396

April 28, 1972

Re: American Radio Association,
AFL-CIO (Pacific Far East
Lines, San Francisco, California)
Case No. 15-CB-1283

Mr. Anthony G. Alateras
c/o Mr. James Koss
300 Pecore Street
Houston, Texas 77009

Dear Mr. Alateras:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that the evidence is insufficient to warrant further proceedings. I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National

Labor Relations Board, Washington, D.C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on May 11, 1972. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

Louis V. Baldovin, Jr.
Acting Regional Director

CERTIFIED MAIL
cc: (See page 2)

cc: Edwin A. Steinberg, Esq.
90 Park Avenue
New York, New York 10016

cc: E. Howard McCaleb III, Esq.
627 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

cc: American Radio Association, AFL-CIO
Room 413 Perdido Building
822 Perdido Street
New Orleans, Louisiana 70112

cc: Pacific Far East Lines
Pier 29
San Francisco, California 94111

APPENDIX C

LETTER FROM NATIONAL LABOR RELATIONS BOARD TO ANTHONY G. ALATERAS

NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
Washington, D.C. 20570

June 29, 1972

Re: American Radio Association, AFL-CIO (Pacific Far East Lines, San Francisco, California)
Case No. 15-CB-1283

Mr. Anthony G. Alateras
300 Pecore Street - Apt. 30
Houston, Texas 77009

Dear Mr. Alateras:

Your appeal in the above matter has been duly considered.

The appeal is denied. The evidence failed to indicated that the Union's refusal to permit you to register on the Standby list was for any reason other than its belief that you and the Pacific Far East Lines were trying to circumvent the hiring hall procedures in order to insure your being hired by the Company. In the absence of a showing that the Union was motivated by any unlawful intent, its

actions in this regard were not deemed violative of the Act.

Very truly yours,

Peter G. Nash
General Counsel

By: s/ Irving M. Herman
Irving M. Herman
Director, Office of Appeals

cc: Director, Region 15
Edwin A. Steinberg, Esq., 90 Park Avenue, New York, New York 10016
E. Howard McCaleb, III, Esq., 627 Natl. Bank of Commerce Building, New Orleans, Louisiana 70112
American Radio Association, AFL-CIO, Room 413, Perdido Building, 822 Perdido Street, New Orleans, Louisiana 70112
Pacific Far East Lines, Pier 29, San Francisco, California 94111

CERTIFIED MAIL